No. 05-358

In The

Supreme Court of the United States

ONEITA J. BURNETTE and PAMELA L. BROWN, Co-Administrators of the Estate of Don Mark Wilson, and PAMELA L. BROWN, individually and as next friend for JONATHON WILSON, a minor child,

Petitioners,

versus

JERRY "SLICK" GEE, individually and as Sheriff of Monroe County, Kentucky,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether antecedent facts concerning an officer's knowledge that he was confronting an emotionally disturbed person, the officer's training regarding emotionally disturbed persons (or lack thereof) and the officer's own reckless conduct precipitating his perceived need to use deadly force to accomplish a forceable seizure must be considered on a motion for summary judgment as part of the "totality of the circumstances" in judging the reasonableness of the officer's use of deadly force under the Fourth Amendment to the United States Constitution in a claim wherein said seizure results in the death of the emotionally disturbed person?

2. Whether the "totality of the circumstances" standard articulated in *Graham v. Connor*, 490 U.S. 386 (1989), requires consideration of events preceding the instant a forcible seizure takes place, including forensic evidence, where the seizure results in death leaving the officer employing the deadly force as the only living witness to the circumstances precipitating his perceived need to use deadly force?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit whose interest and position may be affected by further review of this case. Petitioners have chosen to abandon the case as to Monroe County, Kentucky, a party to the proceedings below, allowing the judgment to stand as to that party. Therefore, Petitioners believe that Monroe County, Kentucky, no longer has an interest in the outcome of this petition for certiorari.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Juaneita J. Burnette and Pamela L. Brown, as Co-Administrators of the Estate of Don Mark Wilson, and Pamela L. Brown, individually and as next friend for Jonathon Wilson, a minor child, respectfully pray that a Writ of Certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit, entered on June 21, 2005.

OPINIONS BELOW

Neither the opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, nor the opinion of the United States District Court for the Western District of Kentucky in this case was recommended for full-text publication but both are reprinted in the appendix hereto, at pp. App. 1-App. 14 and App. 15-App. 27, respectively.

JURISDICTION

An order of the United States Court of Appeals for the Sixth Circuit was entered on June 21, 2005, affirming the order of the United States District Court for the Western District of Kentucky which granted the Respondent's motion for summary judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law."

The relevant portion of 42 U.S.C. §1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Western District of Kentucky on March 26, 2003, alleging, *inter alia*, that the Respondent, Monroe County, Kentucky, Sheriff Jerry "Slick" Gee (hereinafter "Sheriff Gee"), deprived Don Mark Wilson (hereinafter "Wilson") of his life without due process of law in violation of Wilson's rights under the Fourth Amendment to the United States Constitution. Additionally, Petitioners claimed that the killing violated Wilson's children's separate constitutional right to association with their father. Petitioners' claims were asserted under 42 U.S.C. §1983.

Supplemental claims were also brought under Kentucky tort law.

Wilson was a 40-year old father of two children from Tompkinsville, Kentucky. He had no history or reputation of lawlessness or violence in his community. Wilson, who worked most of his life as a maintenance mechanic, was disabled due to a severe low back condition and chronic bronchitis. He required a cane to walk.[1]

During the months prior to his death, Wilson became noticeably depressed because of his unemployment, the subsequent separation from his wife and his lack of any income to support himself and their minor son who continued to live with him. After Wilson mentioned to his family that he had suicidal thoughts, his daughter scheduled an appointment for him the very afternoon of his death at the local mental health clinic.

On the afternoon of April 2, 2002, Wilson's step-father went to Wilson's trailer to remind him of that appointment. However, when the step-father entered the trailer he was unable to wake Wilson, who had taken an overdose of prescription medication.

Wilson's step-father called "911" and the Monroe County Ambulance Service responded, arriving at Wilson's trailer approximately ten minutes later. Emergency personnel entered Wilson's trailer where they found Wilson, Mrs. Burnette, and Wilson's step-father.

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[1] Describing her son, Wilson's mother, Oneita Burnette explained, "And he couldn't walk – he couldn't stand up straight. He couldn't hardly get up when he would sit down. And if he sat down for a while, he couldn't hardly get up, and then he couldn't walk, couldn't stand up, couldn't sit down." (Deposition of Oneita Burnette at 39).

Wilson was sitting on his bed in a small rear bedroom. He appeared lethargic and his speech was slow and labored. Wilson admitted taking "a couple of bottles of pills." He refused to leave with the Monroe County EMT. The EMT testified that as he continued with his plea for Wilson to leave with him, Wilson became "frustrated" but not threatening. Although the EMT acknowledged that he never felt personally threatened during the entire time he was inside Wilson's trailer, the EMT claimed that Wilson had a rifle laying across his lap and Wilson stated that he would shoot any officer who tried to take him away.

The EMT was unsuccessful in convincing Wilson to come with him, and therefore left the trailer. Mrs. Burnette then assisted Wilson from the bed and helped him to the living area of the trailer. She recalled as follows:

> I stayed in the trailer with him [Wilson] and Ralph [Wilson's step-father] went in the kitchen. And he – he [Wilson] finally said I need to get my clothes on. And he had on jogging pants and a T-shirt. And he got this pair of overalls that we had made where I work that I had gotten him. And he pulled them on over his jogging pants. And the little rifle was standing in the corner. And he always – he used a cane, but we couldn't – didn't see where his cane was at. And he got that and he had it in his right hand with a hold of the barrel and he was walking through with it. And I had a hold of his other arm. And he come and he sat down in that chair. . . . He sat down in the chair and I sat down on the couch. He finally got one shoe on, but he was a wheezing and everything bad, his speech was not much above a whisper.

(Deposition of Oneita Burnette at 56, 58).

Wilson did not threaten his mother or step-father, and they continued to talk to Wilson about seeking medical attention, biding time until Wilson's adult daughter could arrive. According to Mrs. Burnette, "we was talking to him trying to give them [Wilson's daughter] time, because they was on their way so they could talk to him. And he would have went for them." (Deposition of Oneita Burnette at 61). Shortly thereafter, Sheriff Jerry "Slick" Gee arrived.

Earlier in the afternoon, Sheriff Gee was working as a bailiff in juvenile court in Monroe County. At about 1:30 p.m. his bookkeeper advised him that he needed to respond to a "possible suicide." Before he left the Monroe County Courthouse, Sheriff Gee also learned that the suicidal subject had a gun.[2]

The EMT who earlier spoke with Wilson was seated in his ambulance only feet from the front door of Wilson's trailer when Sheriff Gee arrived. He testified that the entire episode at the Wilson trailer from the time Sheriff Gee arrived until the fatal shots were fired at Wilson lasted merely two or three minutes.[3] According to both the EMT and Mrs. Burnette, Sheriff Gee immediately approached and

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[2] Although Sheriff Gee contended that he was told that Wilson threatened the ambulance personnel, "pulled a gun" on them or had "run them off" with a gun, the dispatch log indicated only that Wilson was "armed with a gun." In fact, the ambulance personnel confirmed that they were never overtly threatened by Wilson and never felt personally threatened by him.

[3] According to the Sheriff's Office official dispatch log, only 18 minutes transpired between the time the call was first made to the dispatch center by the ambulance service personnel, the bookkeeper located Sheriff Gee, Sheriff Gee drove the five miles to the scene, killed Wilson and radioed back to dispatch that shots were fired.

entered the Wilson trailer. Mrs. Burnette described Sheriff Gee's entry as follows:

> A.: He [Sheriff Gee] steps in the door and he says – he looks at Donnie and he says can I talk to you. And Donnie said yes.
>
> Q.: Okay. And what did he say?
>
> A.: He said, well, I don't want to get shot. And Donnie said, I'm not going to hurt nobody.
>
> Q.: Did Donnie –
>
> A.: He looked straight at me then and said you go outside.

(Deposition of Oneita Burnette at 62-64). Sheriff Gee obtained no warrant for Wilson's arrest or court order to enter Wilson's trailer. According to Sheriff Gee, his intent was not to arrest Wilson but to make him go with ambulance personnel for treatment. However, at no time during the entire sequence of events which culminated in Sheriff Gee's killing of Wilson did Sheriff Gee, whose gun was already drawn, announce why he was present, nor did he ask Wilson to leave with the ambulance personnel.

In compliance with Sheriff Gee's order to leave the trailer, Mrs. Burnette stepped outside the front door and then placed one foot on the ground. As Mrs. Burnette left the trailer, Wilson was holding the barrel of the rifle outside the right arm of his large stuffed comfort chair with the stock resting on the floor. Shortly after the shooting, Sheriff Gee also acknowledged that prior to his gun-drawn rush Wilson put his gun down and leaned it against the large chair. Kentucky State Police Detective Rick Underwood recorded Sheriff Gee's explanation as follows:

> He [Sheriff Gee] advised that Wilson told him to come in and sit down and he told Wilson to put the gun down and he would come in however Wilson would not put the gun down while he was talking with him for a long time he was holding the rifle across his lap. Gee advised that when Wilson put the gun down on the butt end propped up against the chair arm he bent over and started to put his shoes on and he (Gee) saw this as an opportunity to rush him and try to get control of the gun.

Having second thoughts about leaving her son alone in the trailer with Sheriff Gee, Mrs. Burnette immediately turned and headed back inside. According to Mrs. Burnette, when she turned and looked back in the trailer, Sheriff Gee was already over her son, shooting him dead.[4]

Whether Wilson put the rifle down against the outside arm of his large chair or whether he kept it at his side was critical to the evaluation of Sheriff Gee's subsequent conduct. The distance between Sheriff Gee and Wilson immediately before the Sheriff's fatal rush was only a few feet and was certainly covered by the Sheriff in split-seconds. On the other hand, the combination of Wilson's severe back pain, his dire respiratory condition and the effects of the sedatives taken by him earlier in the day obviously suppressed Wilson's reaction time when surprised by Sheriff Gee's gun-drawn charge.

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[4] The "shoot first, ask questions later" reaction of Sheriff Gee described by Wilson's mother is consistent with four previous episodes described by Gee himself where he shot and killed or injured other citizens while purporting to act in law enforcement. (Deposition of Jerry Gee at 14-39). Disturbingly, Sheriff Gee's own expert, Kentucky State Police Sergeant Alex Payne, testified that he knew of no other officer who has shot as many people as has Sheriff Gee. (Deposition of Sergeant Alex Payne at 62-63).

Contrary to Mrs. Burnette's observation and his own statement to Kentucky State Police shortly after the incident, Sheriff Gee claimed that he encountered Wilson seated in the stuffed chair with the rifle located between Wilson's right hip and the inside of the right arm of the chair with the barrel pointing to the floor. He contended that Wilson then bent over to his left, away from the rifle, with both arms reaching to try to put on his other boot. Explaining that he saw this as an opportunity, Sheriff Gee, with his handgun already drawn, then rushed Wilson.

In those split seconds, according to Sheriff Gee, Wilson responded to his rush by straightening up and grabbing the rifle with his right hand. Wilson then attempted to raise the rifle toward Sheriff Gee with his right arm while struggling for Sheriff Gee's gun with his left hand. Sheriff Gee testified that during the struggle, he shot Wilson four times in the arm and chest. Sheriff Gee claims that he then immediately pulled the rifle from Wilson's grasp and handed it back to Deputy Herbert "Sprocket" Profitt who was standing behind him.[6]

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[6] Sheriff Gee's claim that Wilson held the rifle with his right hand before Sheriff Gee took control of the rifle after the struggle and immediately handed it back to his deputy was inconsistent with the observations of Tompkinsville Patrolman Dale "Frog" Ford. Officer Ford was parked on the road in front of the trailer stationed behind his cruiser for cover, a distance that Sheriff Gee estimated at twenty to thirty yards. When Officer Ford heard the shots, he got up from his station, went around his cruiser, ran the twenty to thirty yards to the trailer and stepped inside. Despite the obvious time lapse between the firing of shots and Officer Ford's arrival in the trailer, he was still able to observe the sheriff "picking the rifle up" and "turning around" to hand the rifle to Deputy Profitt. Equally inconsistent was the EMT's testimony that he saw the rifle lying on the floor "four or five feet away" from Wilson when he re-entered the trailer following the shooting. One can

(Continued on following page)

Inconsistent with the arm-to-arm struggle that Sheriff Gee described, Dr. George Nichols, former Kentucky Chief Medical Examiner, pointed out that the fatal shots fired by the Sheriff's right hand into Wilson's body were from *above* Wilson, at a 60 degree angle, and came from Wilson's right. Furthermore, Sheriff Gee's claim that Wilson held the rifle with his right hand as it rested between Wilson's right hip and the arm of the stuffed chair in which he was seated was contradicted by Mrs. Burnette's testimony that when she left the trailer just seconds before the shooting, her son held the rifle upright on the outside of the right arm of the chair. Sheriff Gee's location of the rifle is also refuted by his own statement to Detective Underwood that immediately prior to his charge Wilson put the gun down with the butt end resting on the floor, propped up against the chair. Likewise, Sheriff Gee's description of the struggle, with Wilson using his left hand to try to disarm the Sheriff, appeared spurious given Dr. Nichols' finding that Sheriff Gee's bullets actually passed through the ***back*** of Wilson's left hand into his body and Dr. Nichols' conclusion that Wilson's left hand and arm, "could not have been significantly extended away from the body at the time of the shooting and the left hand could not have held or grabbed any object significantly away from Mr. Wilson's frontal abdomen." Finally, the findings of Ronnie Freel, the former Director of the Kentucky State Police Ballistics Lab, that the fatal shots were fired within

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reasonably infer from the testimony of Mrs. Burnette, the EMT and Officer Ford that the rifle was not within Wilson's grasp when Sheriff Gee made the fatal charge, but instead that after shooting Wilson the Sheriff picked the rifle up from a location remote from Wilson's body and handed it to Deputy Profitt after the EMT and Officer Ford entered the trailer following the shooting.

ten inches of Wilson's body placed the Sheriff too close to Wilson for Wilson's **40-inch long rifle** to have been pointing at Sheriff Gee.

Former F.B.I. agent and police practices expert, Melvin Tucker, reviewed the proof in this case for Petitioners. He testified that Sheriff Gee's use of lethal force was objectively unreasonable, even if the facts were as stated by Sheriff Gee. Citing several model law enforcement policies dealing with mentally ill and combative subjects, Mr. Tucker criticized Sheriff Gee for violating practically every known standard for dealing with the mentally ill, or for that matter any armed, hostile subject. According to Mr. Tucker, Sheriff Gee recklessly created the very circumstance which caused him to perceive the need to employ lethal force.

Wilson died in his trailer moments after being shot by Sheriff Gee.

Shortly before trial, Sheriff Gee moved the district court for summary judgment, claiming that he was entitled to immunity from liability. That court determined the case turned on a single question: Whether, "when Sheriff Gee 'charged' Mr. Wilson, the latter responded by reaching for his rifle." (App. 17). Finding that Sheriff Gee was the only witness to his encounter with Wilson, the district judge accepted the sheriff's description of Wilson's reaction to the charge and considered the case in the context of Sheriff Gee, "facing an armed, mentally unstable person" posing an "immediate threat" to him. (App. 22, 24).

The district court specifically rejected the Petitioners' argument that Sheriff Gee violated all known standards for dealing with the mentally ill and that Sheriff Gee recklessly created the circumstances which caused him to

perceive the need for the use of deadly force. That court further found that notwithstanding any antecedent facts, "once the sheriff began that charge his actions were objectively reasonable." (App. 22). Under this analysis, the district judge held that Sheriff Gee did not violate Wilson's Fourth Amendment rights and, even if he did, Sheriff Gee was immune from liability. (App. 23).

The Sixth Circuit affirmed the district court's decision that no Constitutional violation occurred and failed to reach Sheriff Gee's immunity defense. (App. 11). It agreed with the district court's narrow view of the facts to be considered, particularly its exclusion of antecedent facts. In discussing the Petitioners' forensic evidence, rather than construing that evidence in the light most favorable to Petitioners, the Sixth Circuit strained to characterize the evidence as not necessarily in conflict with Sheriff Gee's own self-serving explanation. (App. 11).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Resolve the Direct Conflict Among the Circuit Courts Over Whether Antecedent Facts, Including the Officer's Knowledge of the Emotional Instability of a Person to be Seized by the Officer and the Officer's Own Reckless Conduct Precipitating his Perceived Need to Use Deadly Force to Accomplish the Seizure Must Be Considered as Part of the "Totality of the Circumstances" in Judging the Reasonableness of the Officer's Use of Deadly Force Under the Fourth Amendment to the United States Constitution.[8]

A. This Case Squarely Presents the Conflict.

The circuit courts clearly wrestle with the issue of which facts and circumstances must be considered in claims alleging that use of force to effect a seizure are unreasonable, whether the subject to be seized is an emotionally disturbed person or not. Some courts take a narrow view and consider the reasonableness of an officer's actions only in terms of the circumstances present at the precise instant the officer chose to employ deadly force. Other courts hold that antecedent facts and circumstances leading up to a shooting should be considered in determining

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[8] Petitioners presented supplemental claims against Sheriff Gee under Kentucky tort law. The standard used to measure an officer's "good faith" under Kentucky law, entitling him to official immunity, is virtually identical to the standard by which the officer's conduct is measured under the Fourth Amendment to the United States Constitution. (App. 13-14, 25-26). Therefore, the issue of the Sixth Circuit's dismissal of Petitioners' state law claims is fairly encompassed in the issue presented by this Petition. As a result, reversal of the lower courts' decisions on the federal claims necessarily also merits reversal on the state law claims.

the reasonableness of an officer's use of force. Perhaps as troubling as the stark disagreement among the courts is the vagueness and imprecision of the courts' articulation of their divergent positions.

Inexplicably, in a nation which champions the uniform enforcement of the federal law, a police shooting in New York City is evaluated under substantially different criteria than a shooting under the very same circumstances occurring just across the Hudson River in New Jersey. By the same token, an officer in Youngstown, Ohio, may be immune from liability for practically the same conduct that imposes liability upon an officer twenty miles away in Sharon, Pennsylvania, and officers in Kansas City, Kansas, must be trained that the law holds them accountable in damages for their reckless provocation of a violent confrontation while in Kansas City, Missouri, the same admonition is unnecessary.

The First, Third, Ninth and Tenth Circuits all hold that an officer's actions prior to the instant that seizure is accomplished or deadly force employed must be considered in assessing the reasonableness of the officer's actions.

The Third Circuit, in *Abraham v. Raso*, 183 F.3d 279, 291 (3rd Cir. 1999), articulated a clear position that "[T]he 'totality of the circumstances' standard requires consideration of events preceding the instant a seizure takes place." In rejecting cases from other circuits to the contrary, the Third Circuit explained:

> [W]e do not see how these cases can reconcile the Supreme Court's rule requiring examination of the "totality of the circumstances" with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished.

> "Totality" is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

While acknowledging that not all preceding events are of equal importance and that some may not be of any importance, the consequence of these events should be measured on "ordinary ideas of causation, not doctrine about when the seizure occurred." *Id.* at 292.

Likewise, in *St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995), the First Circuit rejected the officer's argument that his actions need be examined for reasonableness only at the moment of the shooting. Instead, the court declared that the officer's actions leading up to the shooting should be taken into account.

In reviewing the evolvement of its position on the issue, the Ninth Circuit concluded that, "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002).

The Tenth Circuit, while holding that pre-seizure conduct is relevant, limits the relevant conduct to evidence of the officer's "reckless" conduct which is "immediately connected" to the officer's use of deadly force. *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001), *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997).

In direct conflict with their sister circuits, the Second, Fourth, Fifth, Eighth and Eleventh Circuits limit the factors to be considered in measuring an officer's reasonableness to

those existing at the instant a seizure is made or use of deadly force employed.

In *Salim v. Proulx*, 93 F.3d 86 (2nd Cir. 1996), the Second Circuit specifically rejected the argument that an officer was liable for a shooting because he created the situation in which the use of deadly force became necessary. The court held that only circumstances immediately prior to and at the instant that an officer makes the "split-second" decision to employ deadly force are relevant. Likewise, in *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992), the argument that an officer's actions in manufacturing the circumstances that gave rise to a fatal shooting should be considered in evaluating the reasonableness of the officer's actions was rejected by the Fifth Circuit. Similar reasoning, de-emphasizing antecedent events and instead focusing on the nature of the "split-second" judgments that officers must make, was employed by the Fourth and Eighth Circuits in *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991) and *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995), respectively.

Finally, while the issue is not as precisely framed, in *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994), the Eleventh Circuit's evaluation of the officer's actions was clearly limited to the officer's behavior beginning only minutes prior to fatal shots fired by an officer at the instant when the decedent first began firing at the officer.

Closely aligned with the circuits taking the view that antecedent facts are irrelevant, the Sixth and Seventh Circuits attempt to divide an incident into discreet "segments" and then analyze whether the officer's conduct at the final such stage of an incident is reasonable. *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996), *Plakas v.*

Drinski, 19 F.3d 1143 (7th Cir. 1994). This view holds that the officer's unreasonable conduct during any preceding segment is outside the context in which the officer's use of deadly force in the final segment must be evaluated.

This case squarely presents the conflict among the circuit courts. The Petitioners argued that the reasonableness of Sheriff Gee's killing of Wilson must be viewed in light of antecedent facts, including Sheriff Gee's knowledge that he was confronting an emotionally disturbed man, that the man was not posing a threat to anyone and, most significantly, that Sheriff Gee's bumbling gun-drawn charge created the perceived need for him to employ deadly force. However, the Sixth Circuit rejected the Petitioners' argument, citing *Gaddis v. Redford Twp.*, 364 F.3d 763 (6th Cir. 2004), as support for its contention that a "segmental" evaluation was appropriate and thus the antecedent facts cited by Petitioners, including Sheriff Gee's gun-drawn charge, were irrelevant. (App. 7-8).

Although the antecedent facts cited by Petitioners are clearly relevant under the rule in the Third and Tenth Circuits, and probably the Ninth Circuit as well, the Sixth Circuit's rejection of any evidence prior to the "split-second" when an officer employs deadly force rendered critical information irrelevant and outside the "totality of the circumstances" it considered.

Without resolution of the conflict by this Court, lower courts will continue to disagree over what facts are to be properly considered in evaluating the reasonableness of an officer's use of deadly force to effect a seizure.

B. The Issue Presented by the Conflict Is Recurring and of great Practical Importance.

Large numbers of people with emotional problems live freely in American society. As a result, police officers commonly confront emotionally disturbed people in the ordinary course of their duties. In fact, one study reported that in medium and large cities nationwide, approximately seven percent of police calls involve mentally ill people.[7] In Los Angeles, according to another study, as many as ten percent of calls involve mentally disturbed people.[8] A third study found that in New York City, police respond to 18,000 calls per year involving emotionally disturbed people.[9]

While most officers' encounters with mentally disturbed people are resolved without incident, in many the officer shoots and seriously injures or kills the disturbed person. A large number of the latter instances result in claims filed under the federal civil rights statute, 42 U.S.C. §1983, alleging that the shooting constituted an unreasonable use of force in violation of the Fourth Amendment to the United States Constitution.

Furthermore, even without the dynamic of the precarious emotional state of the person encountered, officers

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[7] Randy Borum, *et al.*, *Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness*, 16 Behav. Sci. & L. 393, 393-94 (1998) (citing Martha Williams Deane, *Emerging Partnerships Between Mental Health and Law Enforcement*, 50 Psychiatric Services 99 (1999)).

[8] Michael Jonathan Grinfield, *Dying for Treatment: Police Shootings Spur Calls for Change*, Psychiatric Times, Feb. 2000, at 283.

[9] James J. Fyfe, *Policing the Emotionally Disturbed*, 28 J. Am. Acad. Psychiatry L. 345 (2000).

are confronted with many other instances where use of deadly force is contemplated in the context of a proposed seizure. This Court instructs that the constitutional reasonableness of an officer's seizure is determined against the backdrop of the "totality of the circumstances" attendant to the incident in question. *Graham v. Connor*, 490 U.S. 386 (1989). Unfortunately, the divergency of opinions from the federal circuit courts of appeal and the lack of any specific guidance in the particular case of the emotionally disturbed has rendered the "totality of the circumstances" test deficient in deterring officer misconduct and providing remedies for victims of officer misconduct, especially for those who are mentally or emotionally disturbed.

Only a resolution by this Court can lay to rest the clear doctrinal confusion concerning the legal standards by which civil rights claims on behalf of such injured or deceased persons should be judged.

II. The Lower Court's Decision Was Incorrect Because In Determining that there Was No Genuine Issue of Material Fact, It Failed to Heed Compelling Evidence That Wilson Was Not Reaching for His Rifle When Killed by Sheriff Gee and In Failing to Rigorously Evaluate Sheriff Gee's Testimony in Light of the Forensic and Other Evidence.

Both of the courts below expressed grave concern for the tragedy which resulted in Wilson's death, stating:

> We cannot end our discussion of this case without acknowledging the personal and family tragedy it relates. We believe the district court said it eloquently and we quote from its opinion: "Finally,

> this Court notes that nothing in this opinion is meant to trivialize or diminish the tragedy that occurred on April 2, 2002, or to excuse Sheriff Gee's conduct on that day. It may be that in retrospect his actions were rash, foolish, or unwise. Such actions, however, do not give rise to claims under the law this Court is obligated to follow."

(App. 14). However, contrary to the lower courts' lament, the law controlling adjudication of the claims arising from the April 2, 2002, "tragedy," compelled a wholly different result.

The district court dismissed Petitioners' case on summary judgment, holding that Sheriff Gee's actions did not rise to a violation of Wilson's Fourth Amendment right to be free from excessive force. Even if they did, according to the district court, Sheriff Gee was immune from liability. (App. 22-24). The Sixth Circuit affirmed on the basis of the perceived lack of any constitutional violation and therefore did not address Sheriff Gee's qualified immunity defense. (App. 11).

Rather than reaching their respective decisions based on the true "totality of the circumstances," the lower courts improperly applied the Sixth Circuit's narrow view of the relevant circumstances and refused to consider the antecedent facts which Petitioners urged created an issue of material fact for a jury's consideration.

Even if many of the antecedent facts, including Wilson's emotional state and Sheriff Gee's knowledge thereof, were irrelevant under the Sixth Circuit's rule, Sheriff Gee's reckless gun-drawn charge clearly fell within the final "segment" of the encounter between Wilson and Sheriff Gee and should have been considered as part of the

Sixth Circuit's narrow view of the "totality of the circumstances." Had the lower courts considered the true "totality of the circumstances" or even correctly evaluated the evidence under its own segmental analysis, a question of fact was clearly presented for a jury.

Instead, the lower courts placed great weight on Sheriff Gee's explanation of his perceived need to use lethal force because he, "remains the only witness to his encounter." (App. 17). According to the district court, "Only one additional (uncontested) material fact is needed to resolve this case: when Sheriff Gee 'charged' Mr. Wilson, the latter responded by reaching for his rifle." (Id.). Relying exclusively on Sheriff Gee's testimony to determine that it was "uncontested" that Wilson "reached for his rifle" in response to Sheriff Gee's charge, the lower courts had little trouble holding that an officer such as Sheriff Gee was privileged to use deadly force to defend himself.

Unfortunately, the lower courts completely discounted the Petitioners' proof that Wilson was *not* reaching for his rifle at the time he was killed. The Sixth Circuit provided a token reference to *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994), for the proposition that, "where the officer defendant is the only witness left alive to testify, the award of summary judgment to the defense in a deadly force case must be decided with particular care." (App. 6). However, the Sixth Circuit failed to heed its own admonition and off-handedly dismissed the Petitioners' evidence as irrelevant.

The Petitioners presented proof that Wilson did not have physical possession of the rifle when Sheriff Gee began his charge, it being located remote to Wilson's body as Wilson bent to his left with both hands to put on his

boot. Other evidence suggested that during the split-seconds of the Sheriff's charge, Wilson in his disabled and sedated state, could not have reacted quickly or precisely enough to reach for the rifle. In fact, the Petitioners' evidence indicated that Wilson was shot before he was even able to fully rise from his bent position.

If Wilson was not reaching for the rifle in response to Sheriff Gee's charge, it is disturbingly clear that Sheriff Gee shot and killed Wilson in Wilson's own home, after Wilson invited the Sheriff in to sit with him, complied with the Sheriff's order by putting his rifle down and bent over away from the rifle to put on his boots, presumably to leave with the Sheriff. "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Wilson had a clearly established right not to be shot unless he posed a threat to Sheriff Gee or others. *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991).

Yet, rather than considering the Petitioners' evidence in a light most favorable to them, as is required in reviewing a motion for summary judgment, the lower courts' analysis was tilted toward showing that the evidence *could* be interpreted as not inconsistent with Sheriff Gee's own testimony. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251 (1986).

The rule set forth by the Seventh Circuit in *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994), and cited by the Sixth Circuit in this case, is a sound one. Reviewing courts must be cognizant of the disturbing fact that in death cases the defendant officer, "knows that the only person likely to contradict him or her is beyond reach. . . ." (*Id.*, App. 6). The same rule is followed in the Third and

Ninth Circuits. *See Abraham v. Raso*, 183 F.3d 279, 294 (3rd Cir. 1999), *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Under these circumstances it is even more critical that the evidence be considered in a light most favorable to the plaintiff rather than construing the facts to determine if they *could* be consistent with the defendant officer's self-serving explanation.

The lower courts erred by failing to recognize that in a light most favorable to the Petitioners, the facts of this case could compel a jury to find that Sheriff Gee's use of deadly force was unconstitutionally excessive.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted to consider those issues identified herein.

Respectfully submitted on September 15, 2005

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 04-5551

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ONEITA J. BURNETTE and PAMELA L. BROWN, Co-Administrators of the estate of Don Mark Wilson, and PAMELA L. BROWN, individually and as next friend for JONATHON WILSON, a minor child,	)	
Appellants,	)	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, BOWLING GREEN DIVISION**
v.	)	
JERRY "SLICK" GEE, individually and as Sheriff of Monroe County, Kentucky, and MONROE COUNTY, KENTUCKY,	)	
Appellees.	)	

(Filed Jun. 21, 2005)

Before COLE and SUTTON, Circuit Judges; BARZILAY, Judge.*

BARZILAY, Judge. This is a wrongful death case brought under the Fourth and Fourteenth Amendments of the United States Constitution. Decedent's estate appeals

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* The Honorable Judith M. Barzilay, Judge of the United States Court of International Trade, sitting by designation.

the district court's grant of summary judgment to both the officer who shot and killed decedent and to the municipality that employed the officer. Because the district court did not err in finding that (1) the officer's conduct was reasonable under the circumstances, (2) the municipality's policy regarding deadly force was not unconstitutional, and (3) the officer was entitled to official immunity under Kentucky law for his actions, this Court affirms the district court's opinion.

I. Background

The tragic series of events in this case unfolded as follows. On April 2, 2002, Don Mark Wilson (hereinafter "Wilson") attempted suicide in his trailer by taking an overdose of prescription medication. A family member found Wilson unconscious and called 911. The 911 call was dispatched to the Monroe County Ambulance Service and shortly afterwards the ambulance arrived at Wilson's trailer. Upon arrival, the ambulance staff learned that Wilson may have attempted suicide and, following standard operating procedure, called for police assistance.

One of the paramedics, Paul McKiddy (hereinafter "McKiddy"), entered the trailer and found Wilson sitting on the bed. He tried to persuade Wilson to go with him to the hospital but Wilson refused. McKiddy testified that as he continued to plead with Wilson to get medical treatment, Wilson picked up a rifle and held it in his lap. Joint Appendix (hereinafter J.A.) 260 (McKiddy Depo.). McKiddy also testified that when he informed Wilson that law enforcement was coming, Wilson responded by saying that he would shoot anyone who tried to take him away. J.A. 268 (McKiddy Depo.). McKiddy then left the trailer

and waited in his ambulance for the police to arrive. After McKiddy left the trailer, Ms. Burnette, Wilson's mother, helped him move from the bed to a chair. While moving, Wilson, who usually had a cane, used his rifle as a walking stick. J.A. 164, 171 (Burnette Depo.). After sitting down, Wilson kept the rifle on the right side of the chair. *Id.* A few minutes later, Sheriff Jerry "Slick" Gee (hereinafter "Sheriff Gee" or "Gee") arrived on the scene.

When Sheriff Gee was informed that a possible suicide was in progress by the police dispatcher, he was also told that the suicidal subject had a gun and had threatened the employees of the Ambulance Service with it. When he arrived at the trailer, two unidentified young men in the front yard informed Sheriff Gee that Wilson had "gone crazy" and that he had a gun.

When Sheriff Gee entered the trailer, there were three persons present: Wilson, Ms. Burnette, and Ms. Burnette's husband. Wilson was sitting in a chair with a rifle and neither of the Burnettes said anything. Sheriff Gee testified that based on these facts, he believed that either Wilson had threatened them or they were being held hostage. Sheriff Gee then asked Wilson if the Burnettes could leave the trailer. After an affirmative response from Wilson, the Burnettes left leaving Wilson and Sheriff Gee alone in the trailer. Ms. Burnette testified that when she left the scene, Wilson was holding the barrel of the rifle outside the right arm of the chair with the butt of the rifle resting on the ground.

The following sequence of events took place in a span of approximately two to three minutes and the only witness to these events is Sheriff Gee. Sheriff Gee testified that he repeatedly asked Wilson to put the gun down but

Wilson refused. Wilson stood up from the chair, held the rifle with his right hand near the trigger, and stated that he just wanted to die and go to hell. J.A. 238. (Gee Depo.). Wilson sat back down in the chair, placing the butt of the rifle between his right hip and the arm of the chair with the barrel pointing to the floor. J.A. 239 (Gee Depo.). Wilson then reached down to put on his left shoe. J.A. 240 (Gee Depo.). Sheriff Gee thought that this was a good opportunity to disarm Wilson, so he drew his own gun and charged toward Wilson. *Id.* As Sheriff Gee approached Wilson, Wilson grabbed his rifle and raised it towards Sheriff Gee. J.A. 241 (Gee Depo.). Sheriff Gee grabbed the rifle with his left hand and tried to push it down since he felt the barrel of the rifle against his vest near his waist line. *Id.* When Sheriff Gee was unable to wrestle the rifle from Wilson, he shot Wilson four times until he ceased struggling. *Id.* Sheriff Gee testified that when Wilson grabbed the rifle and resisted Sheriff Gee's attempt to disarm him, he believed that his life was in danger and he shot Wilson to protect himself. J.A. 242 (Gee Depo.). Wilson died as a result of the gunshot wounds.

Plaintiff-Appellant Burnette, acting on behalf of Mr. Wilson's estate, filed suit under 42 U.S.C. § 1983 against Sheriff Gee and Monroe County, alleging that the fatal shooting of the decedent, Don Mark Wilson, by Sheriff Gee violated Wilson's constitutional rights under the Fourth and Fourteenth Amendments of the United States Constitution. Appellant also asserted state law negligence claims against Sheriff Gee in his individual capacity. The Appellees moved for summary judgment, and the district court granted summary judgment to the Appellees on the federal claim and dismissed the state law claims. The district court held that Sheriff Gee did not violate the Fourth or

Fourteenth Amendments when he shot and killed Mr. Wilson. Alternatively, the court held that if Sheriff Gee did violate those amendments, he is entitled to qualified immunity. Plaintiffs timely appealed to this court the district court's grant of summary judgment. We have jurisdiction over the district court's final judgment under 28 U.S.C. § 1291.

II. Discussion

We review the district court's grant of summary judgment *de novo*. *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Summary judgment is proper where the movant through "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, [shows] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In deciding a motion for summary judgment, this court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *McLean*, 224 F.3d at 800. In order to rebut a properly supported motion for summary judgment, the nonmovant must set forth some evidence which, viewed in the light most favorable to him, could entitle him to a judgment. *Fogerty v. MGM Group Holdings Corp., Inc.*, 379 F.3d 348, 353 (6th Cir. 2004) (citing *Cox v. Ky. Dep't. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995)). "[A] nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations or subjective evidence. Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment." *Cox*, 53 F.3d at 150 (6th Cir. 1995).

Furthermore, where the officer defendant is the only witness left alive to testify, the award of summary judgment to the defense in a deadly force case must be decided with particular care. *See Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994) (The "defendant knows that the only person likely to contradict him or her is beyond reach. . . . [s]o a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at trial.").

Plaintiffs contend that the district court erred in granting summary judgment to Gee, arguing before this court that there is enough evidence to cast doubt on the defendant's version of the facts, and thus that there is a genuine issue of material fact as to whether Gee used excessive force against Wilson. We agree with the district court that under 42 U.S.C. § 1983, "[t]he sole constitutional standard for evaluating excessive force claims is the Fourth Amendment's criterion of reasonableness." *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 772 (6th Cir. 2004). In evaluating the reasonableness of an officer's conduct, courts look to the totality of the circumstances including "the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of others, and whether he was actively resisting arrest or attempting to evade arrest by flight." *Gaddis*, 364 F.3d at 772 (internal quotation marks omitted).

A. Constitutional Excessive Force Claims

The plaintiffs' argument below was two-fold: (1) that Gee's decision to make a gun-drawn charge towards

Wilson when Wilson posed no immediate threat to Gee or anyone else was unreasonable; and (2) that even after Gee charged Wilson, it was unreasonable for Gee to shoot Wilson because, they allege, Wilson did not lift up or point his rifle at Gee; instead, he maintained a rather innocent posture. The district court, however, determined that when evaluating the "reasonableness" of an officer's conduct, it is to look only to the direct moments preceding the attack, not to the fact that Gee charged Wilson. The district court then concluded that it was uncontested that Wilson had reached for his rifle and therefore, that Gee did not use excessive force because he reasonably feared for his own life.

(1)

Appellants rely on *Gaddis*, 364 F.3d 763, in support of the proposition that the district court should have considered Sheriff Gee's decision to charge at Wilson when evaluating the reasonableness of the shooting. *Gaddis*, however, is distinguishable from the instant case. In *Gaddis*, each of the moments preceding the shooting was evaluated as an individual instance of potential excessive force, whereas in this case, Sheriff Gee's charge towards Wilson cannot itself be construed as excessive force, as it did not involve any physical contact between Gee and Wilson. *Cf. Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986) (finding that a high speed chase itself could not constitute excessive force where there was no physical contact with the suspect being chased). Furthermore, contrary to the Appellants' argument that even if Wilson did reach for his rifle, it was in response to Sheriff Gee's gun-drawn charge, Sheriff Gee's conduct cannot reasonably be construed as that which would or should have provoked Wilson to pick

up his weapon. While courts have considered an officer's prior actions in their analysis of the reasonableness of the officer's subsequent actions towards a suspect, courts have only done so where the prior actions involved excessive force or brutality against the suspect. *See, e.g. Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (stating that "any fear on the officer's part was the fear of retaliation against [the officer's] own unjustified physical abuse"). In this case, however, Sheriff Gee had not beaten or physically mistreated Wilson in any way before attempting to disarm him. Thus, the district court correctly excluded Sheriff Gee's charging of Wilson from its evaluation of his conduct.

(2)

Appellants also argue that issues of material fact exist as to whether Wilson even reached for his rifle in response to Sheriff Gee's charge. Thus, Appellants argue that a jury could find that Sheriff Gee's decision to shoot Wilson was unreasonable under the circumstances. Appellants claim that circumstantial evidence and expert testimony show (1) that Wilson did not have physical possession of the rifle when Sheriff Gee began his charge because the rifle was located too far from Wilson's body as he bent down to tie his boot, (2) that in his disabled and sedated state Wilson could not have reacted quickly or precisely enough to reach for the rifle, and (3) that Wilson was shot before he was able to rise from his bent position.

The district court concluded that there was no conflicting testimony on these issues because Gee and Wilson were the only two people to witness the event and because Wilson, now deceased, cannot offer a competing version of

facts. Consequently, the district court accepted Gee's version of the shooting as true and decided that Gee did not violate Wilson's rights. Unfortunately for the appellants, no direct evidence exists to rebut Sheriff Gee's version of the events. Furthermore, even considering the circumstantial evidence presented by Appellants in a light most favorable to them, there is no reasonable basis for overturning the district court's finding that Wilson reached for or raised his rifle and struggled with Sheriff Gee over the weapon, and that as a consequence, Sheriff Gee reasonably feared for his life when he shot Wilson. We believe that the district court's thorough analysis of the facts supports its grant of summary judgment in favor of Sheriff Gee. *See Plakas*, 19 F.3d at 1146-47.

First, Burnette testified that when she left the trailer moments before the shooting, her son held the rifle upright on the outside of the right arm of his chair. J.A. 171-72 (Burnette Depo.). Gee testified that immediately before the charge, Wilson had his rifle between his right hip and the inside arm of the chair with the barrel pointing to the floor. J.A. 238-39 (Gee Depo.). Appellants argue that in light of this conflicting testimony, this Court must view the rifle as Burnette remembers it, and consequently, the rifle was too far away from Wilson (who was bending over to his left shoe) such that he could have grabbed it as Gee claimed. As noted earlier, Gee claimed that after Burnette left the trailer, however, Wilson stood up with his gun, expressed his desire to die, and then sat down again. This testimony is uncontradicted. Given that there was some time, albeit two minutes at most, between when Burnette left the trailer and when Gee charged Wilson, it is certainly possible that Wilson shifted the position of his rifle slightly. Furthermore, even if Gee was incorrect about the

position of the rifle prior to his charge, this inconsistency is not material because Appellants have presented no evidence that Wilson would have been able to grab the rifle if it had been leaning on the inside arm of the chair, but not if it had been leaning on the outside arm of the chair.

Second, the Plaintiffs presented the district court with a "cause of death" report by Dr. George Nichols, who reviewed the autopsy evidence and concluded that the effects of the drugs consumed by Wilson prior to the shooting would result in "sedation rather than agitation and aggressive behavior." J.A. 92. This evidence is, at best, tenuous. If, for example, Dr. Nichols testified that Wilson would not have been able to react to Gee and reach over and pick up his rifle, then there would be a controverted material fact. In this case, however, the doctor's conclusion that the drugs taken by Wilson would have made him sedated does not actually conflict with Gee's statement that Wilson reached for and grabbed his rifle. By all accounts, Wilson was not asleep or unconscious and he was alert enough to talk to the paramedics, his family, and with Gee. Wilson could have been more sedated than usual, but still have managed to grab the rifle.

Finally, Appellants presented a report produced by Ronnie Freels, a forensic consultant, that concluded that Wilson was shot at close range (between twenty to ten inches) and that the "arm of victim Wilson was shot through first before the penetrating bullets struck the chest of the victim." J.A. 101 (including autopsy photo). Dr. Nichols, who is also a forensic pathologist, noted that Wilson's arm "could not have been significantly extended away from the body at the time of the shooting and the left hand could not have held or grabbed any object significantly

away from Mr. Wilson's frontal abdomen." J.A. 91. Appellants claim that this evidence creates a question as to whether Wilson really had his forty inch rifle pointing directly at Gee at the moment that Gee fired on him. However, Sheriff Gee did not claim that the rifle was pointed directly at him at the moment he fired upon Wilson. Instead, he claimed that he was in a struggle with Wilson and that they were wrestling for possession of the rifle when he fired. Therefore, Appellants' expert analysis does not contradict Gee's testimony of how the charge and shooting occurred.

In sum, the Appellants have not presented any evidence which disputes a material fact. The district court was correct when it concluded that "the testimony of others involved, including Ms. Burnette, Dr. Nichols . . . does not substantially contradict [Gee's] statement that Mr. Wilson reached for his rifle." J.A. 16. Consequently, we cannot find that Gee used or may have used excessive force against Wilson, because Gee could have reasonably feared for his own life. *See Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989) (*citing Young v. City of Killeen, Tex.*, 775 F.2d 1349, 1353 (5th Cir. 1985) ("The use of deadly force is reasonable if an officer believes that there is a threat of serious physical harm to the officer or others.")). Therefore, Sheriff Gee was entitled to summary judgment in his favor. Because this Court finds that Sheriff Gee did not violate Wilson's Fourth Amendment right to be free of excessive force, it need not address Appellants' arguments regarding qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.").

B. Monroe County Policy on Deadly Force

Appellants argue that Monroe County's unwritten policy regarding the use of deadly force is unconstitutional because it gives no deference to the "totality of the circumstances" faced by the County's officers and requires no consideration of the elements of "objective reasonableness." This Court reviews *de novo* whether a municipality's policy is unconstitutional. *See Petty v. United States*, 80 Fed. Appx. 986, 989, 2003 U.S. App. LEXIS 23560, *6 (6th Cir. 2003). Here, the policy complies with the principles annunciated by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), that an officer may use deadly force where a "suspect poses a threat of serious physical harm, either to the officer or to others. . . . " *Id.* at 11; *see also Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989) (holding that "deadly force is reasonable if an officer believes that there is a threat of serious physical harm to the officer or others") (citation omitted). The Appellants have no support for the notion that it is unconstitutional for a municipality to give officers discretion in determining whether a particular suspect or situation poses an immediate danger that warrants the use of deadly force. In fact, the prevailing law suggests the opposite:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly

> evolving – about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 397 (internal citations and quotation marks omitted); *see also Garner*, 471 U.S. at 11-12 (same). Thus, the district court correctly found that the Monroe County policy on deadly force was not unconstitutional.

C. State Law Negligence Claims

The district court retained supplement jurisdiction over Appellants' state law negligence claims and held that Sheriff Gee was entitled to official immunity because no evidence was presented that Sheriff Gee "acted in bad faith, with malicious intention or in reckless disregard" for Wilson's rights. J.A. 24 (Memorandum Opinion at 9-10 (citing *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001)). Appellants argue that by applying this "good faith" standard, the district court incorrectly assumed that Sheriff Gee's actions in attempting to take Wilson into custody were "discretionary" rather than "ministerial" functions. Under Kentucky law, police officers are immune to negligence claims for their discretionary acts, unless it is shown that the officers committed the act in bad faith. *Yanero*, 65 S.W.3d at 523.

Discretionary acts have been defined as those which "necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. Ct. App. 1959) (citation omitted). Discretion in the manner of the performance of an act arises when "the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer

to determine in which way it shall be performed." *Id.* Appellants cite cases indicating that an officer executing his duty to effect a seizure or arrest exercises only a ministerial function. *See Ashby v. City of Louisville*, 841 S.W.2d 184, 189 (Ky. 1992), *Downs v. United States*, 522 F.2d 990, 998 (6th Cir. 1975). In this case, however, unlike in *Ashby*, 841 S.W.2d at 189, Sheriff Gee was not performing a mandatory arrest. When he received the dispatch call, he was merely responding to a possible suicide situation. Later he learned that the victim had a gun and may have threatened others. There was no indication that an arrest needed to be accomplished, and if one did, there were multiple ways of going about it. There were no "fixed and designated facts" requiring a specifically delineated response from Sheriff Gee. Consequently, the approach in investigating Wilson's attempted suicide and the ultimate seizure of Wilson was a discretionary rather than ministerial act. Because the Appellants have not shown that Gee's actions were done in bad faith, the district court correctly dismissed the negligence claims.

We cannot end our discussion of this case without acknowledging the personal and family tragedy it relates. We believe the district court said it eloquently and we quote from its opinion: "Finally, this Court notes that nothing in this opinion is meant to trivialize or diminish the tragedy that occurred on April 2, 2002, or to excuse Sheriff Gee's conduct on that day. It may be that in retrospect his actions were rash, foolish, or unwise. Such actions, however, do not give rise to claims under the law this Court is obligated to follow." Accordingly, the district court's opinion is hereby affirmed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CASE NO. 1:03CV-70-R

ONEITA J. BURNETT, Co-Administrator
of the Estate of Don Mark Wilson, ET AL.

PLAINTIFFS

v.

JERRY "SLICK" GEE, et al.

DEFENDANTS

MEMORANDUM OPINION

This is a wrongful death case brought under the rubric of the Fourth and Fourteenth Amendments to the Constitution of the United States. It concerns Sheriff Jerry Gee's actions on April 2, 2002, which resulted in the death of Mr. Don Mark Wilson. Sheriff Gee has moved for summary judgment (Dkt #10). Ms. Burnett, acting on behalf of Mr. Wilson's estate, responded (Dkt #15), and Sheriff Gee replied (Dkt #22).[1] For the reasons given below, Sheriff Gee's motion for summary judgment is GRANTED.

BACKGROUND

In Ms. Burnett's opposition to Sheriff Gee's motion for summary judgment, she presents the following "contested facts [as] construed in light most favorable to the Plaintiffs." (Dkt #15 at 25.) Although this Court need not accept

[1] For convenience, this Court will use "Ms. Burnett" and "Sheriff Gee" to denote all plaintiffs and defendants, respectively, unless otherwise noted.

these as true, or even as accurate portrayals of the record in this case, it will do so for purposes of this motion.

Ms. Burnett relates the following chronology of events:

> [Sheriff Gee] was responded to an attempted suicide [by Mr. Wilson] where the suicidal subject was in possession of a gun. There was no evidence that [Mr. Wilson] had a history of violence, or that he had been violent to anyone on the day in question. Essentially, Sheriff Gee was responding to the ambulance service personnel's regular protocol under cases involving attempted suicide.
>
> When the Sheriff arrived at the scene, he observed the ambulance service personnel parked feet from the trailer[,] awaiting his arrival. Upon approach to the trailer door, and observation of three subjects inside the trailer, [Mr.] Wilson honored the Sheriff's request and readily permitted his mother [Ms. Burnett] and step-father to exit. [Mr.] Wilson assured the Sheriff that he had no intention of harming anyone and invited the [S]heriff inside to sit down. Sheriff Gee encountered a sedated, decrepit man, seated in a chair. Without revealing his purpose, Sheriff Gee stood feet from [Mr.] Wilson with his firearm drawn. As [Mr.] Wilson bent to his left to finish putting on his boots, without warning the Sheriff made a gun-drawn charge toward him. Wilson reacted by beginning to straighten from his bent position. . . . Sheriff Gee fired four shots into [Mr. Wilson's] body.

(Dkt #15 at 25-26.)

Only one additional (uncontested) material fact is needed to resolve this case: when Sheriff Gee "charged" Mr. Wilson, the latter responded by reaching for his rifle. Ms. Burnett's response to Sheriff Gee's motion for summary judgment attempts to cast doubt on the sheriff's account of where the rifle was positioned and how the struggle with Mr. Wilson occurred. (Dkt #15 at 18-20.) However, Sheriff Gee remains the only witness to his encounter, and the testimony of others involved, including Ms. Burnett, Dr. Nichols, Deputy Profitt and Officer Ford, does not substantially contradict his statement that Mr. Wilson reached for his rifle.

STANDARD

Summary judgment is available under Fed. R. Civ. P. 56(c) if the moving party can establish that the "pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The test is "whether the party bearing the burden of proof has presented a jury question as to each element in the case." *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). The plaintiff must present more than a mere scintilla of the

evidence. To support his position, he must present evidence on which the trier of fact could find for the plaintiff. *See id.* Finally, while Kentucky state law is applicable to this case pursuant to *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), a federal court in a diversity action applies the standards of Fed. R. Civ. P. 56, not "Kentucky's summary judgment standard as expressed in *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, Ky., 807 S.W.2d 476 (1991)." *Gafford v. General Electric Co.*, 997 F.2d 150, 165 (6th Cir. 1993).

ANALYSIS

The parties raise several questions for review. 1) Can Ms. Burnett recover under the Fourth and Fourteenth Amendments, and if so, under what standards? 2) Did Sheriff Gee's unreasonable conduct create a situation requiring him to use deadly force? 3) Were Sheriff Gee's actions consistent with the Fourth and Fourteenth Amendments? 4) Is Sheriff Gee and/or Monroe County liable to Ms. Burnett under the Fourth or Fourteenth Amendments? 5) Is Sheriff Gee liable under state law?

1. Can Ms. Burnett recover under the Fourth and Fourteenth Amendments, and if so, under what standards?

Traditionally 42 U.S.C. § 1983 claims for excessive force are evaluated under the Fourth Amendment, and courts evaluate defendants' actions under the "objective reasonableness" standard. *See Graham v. Connor*, 490 U.S. 386 (1989). Ms. Burnett argues, however, that this case might encompass a "narrow area . . . in the non-seizure, non-prisoner context, [where] the substantive due process right to be free from excessive force is alive and well." (Dkt

#15 at 10 n.10 (citing *Rodriguez v. Phillips*, 66 F.3d 470, 477 (2d Cir. 1995)). As Sheriff Gee rightly notes, however, the Sixth Circuit has observed that even within that sliver of the Fourteenth Amendment substantive due process left undisturbed by *Graham* courts should apply the more concrete "objectively reasonable" standard whenever possible. *Braley v. City of Pontiac*, 906 F.2d 200, 226 (6th Cir. 1990).[3] Even if this Court concluded that an independent Fourteenth Amendment test would apply, that test would not be "clearly disproportionate" as Ms. Burnett asserts, but "shocks the conscience." And as the Sixth Circuit recently concluded, the "shocks the conscience test" is "a more difficult standard for the plaintiff to meet" than the "objectively reasonable" one. *See Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001). If this Court were

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[3] As the Sixth Circuit observed in *Braley*:

> The "shock the conscience" standard, fuzzy under the best of circumstances, becomes fuzzy beyond a court's power to interpret objectively where there is a dearth of previous decisions on which to base the standard. We doubt the utility of such a standard outside the realm of physical abuse, an area in which the consciences of judges are shocked with some degree of uniformity. In that area, however, the test has been abandoned. The Supreme Court recently rejected the "shock the conscience" test in cases of excessive force by police. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Court held that the appropriate standard was the fourth amendment standard for reasonable seizure. The decision in *Graham* was based on the idea that, where available, explicit constitutional guarantees (e.g., protection against unreasonable seizures) offer a more concrete, and therefore superior, guide to judges than intuitive standards such as "behavior that shocks the conscience." After *Graham*, the status of the "shock the conscience" test in contexts other than allegations of excessive force is uncertain.

Braley v. City of Pontiac, 906 F.2d 220, 226 (6th Cir. 1990).

to employ the "shocks the conscience" test, per *Darrah*, it would find potential liability "only if the force was applied 'maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 307 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998)). This Court would have to find that Ms. Burnett can show that "a reasonable jury could find that [Sheriff Gee's] conduct was malicious, sadistic, and imposed not to restore order, but only to cause harm." *Id.* Such a finding is impossible in light of the record because there is absolutely no evidence on the record suggesting malice or sadism on Sheriff Gee's part, or a similar impermissible motive.

This Court concludes that the only standard it must use in evaluating Ms. Burnett's claims, whether brought under the Fourth or Fourteenth Amendments, is "objective reasonableness." This means that

> [t]he sole constitutional standard for evaluating excessive force claims is the Fourth Amendment's criterion of reasonableness. Courts must apply an objective standard, looking to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect pose[d] an immediate threat to the safety of the officers or others, and [3] whether he was actively resisting arrest or attempting to evade arrest by flight.

Gaddis ex rel. Gaddis v. Redford Tp., ___ F.3d ___, 2004 WL 588529 at *6 (6th Cir. 2004).

2) Did Sheriff Gee's unreasonable conduct create a situation requiring him to use deadly force?

Ms. Burnett, relying on cases from the 10th Circuit, argues that this Court should consider whether Sheriff Gee's own actions unreasonably precipitated his use of deadly force, (*See* Dkt #15 at 12 (citing *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995)).) The Sixth Circuit rejected that approach in *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996). In *Dickerson*, the Sixth Circuit held that two § 1983 claims arising out of the same incident, i.e., an unlawful entry followed by the use of deadly force, must be analyzed separately. *Id.* at 1162. Although *Dickerson* did not address the specific issue of provocation, its citations to other circuits, and parenthetical explanations, indicate that provocation is not a sword that plaintiffs may wield against officers using excessive force. *See id.* 1161-62.[3] This conclusion is commonsensical. However

[3] The Sixth Circuit's entire citation reads:

See also Menuel v. City of Atlanta, 25 F3d 990, 997 (11th Cir.1994) (recognizing that "police must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time" and holding that "[n]o responsible officer could disregard the palpable indications of imminent violence that pervaded the [suspect's] household"); *Drewitt v. Pratt*, 999 F.2d 774, 778-80 (4th Cir.1993) (rejecting a claim that an officer who resorts to deadly force in self-defense nevertheless violates the Fourth Amendment if he unreasonably provokes the shooting by failing properly to identify himself as a police officer); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) ("scrutiniz[ing] only the seizure itself not the events leading to the seizure, for reasonableness under the Fourth Amendment" because the "Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general."); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir.1991) (holding that Graham's objective

(Continued on following page)

ill-advised Sheriff Gee's charge might have been, the only appropriate response from Mr. Wilson was acquiescence with Sheriff Gee's demands. His remedy for constitutional violations must come in the courts, not from an immediate response, or attempted response, with force.

3) Were Sheriff Gee's actions consistent with the Fourth and Fourteenth Amendments? And if not, are they protected by qualified immunity?

As noted above, this Court must evaluate Sheriff Gee's actions according to the standard of "objective reasonableness," which means that it will look to the severity of the crime he responded to, the threat Mr. Wilson posed, and whether Mr. Wilson "actively resist[ed] arrest," Even under the facts taken as Ms. Burnett alleges, that is, assuming that Sheriff Gee would have been wise to take a more measured approach to the confrontation with Mr. Wilson and not attempted to charge and disarm him, once the sheriff began that charge his actions were objectively reasonable. Sheriff Gee, the only eyewitness to the incident, testified that Mr. Wilson responded to his charge by attempting to point his rifle at him. *See Caddis*, ___ F.3d. ___, 2004 WL 588529 at *8. This constitutes an immediate threat to Sheriff Gee and privileges his use of deadly force.

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reasonableness test for excessive use of deadly force requires the factfinder to focus on the very moment the officers make the "split-second judgments" and not on the events leading up to the time immediately prior to a shooting); *Sherrod v. Berry*, 856 F.2d 802, 805-06 (7th Cir. 1988) (en banc) (stating that in an excessive force case courts should look to the split second before the officer had to decide what to do).

Dickerson v. McClellan, 101 F.3d 1151, 1161-62 (6th Cir. 1996).

See, e.g., Jones v. Buchanan, 325 F.3d 520, 529 (4th Cir. 2003) (distinguishing a case where the plaintiff was neither armed nor thought to be armed with those where officers "reasonably perceived plaintiff to be armed with a gun.").

Even if Ms. Burnett could make out a violation of the Fourth or Fourteenth Amendments' "objective reasonableness" requirement, Sheriff Gee would be entitled to summary judgment on qualified immunity grounds.

> As the Supreme Court explained in *Harlow v. Fitzgerald*, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."
>
> Whether a defendant is entitled to qualified immunity depends one "(1) whether the facts taken in the light most favorable to plaintiff could establish a constitutional violation; (2) whether the right was a 'clearly established' right of which any reasonable officer would have known; and (3) whether the official's actions were objectively unreasonable in light of that clearly established right."

Adams v. City of Auburn Hills, 336 F.3d 515, 518 (6th Cir. 2003).

Here, assuming for the sake of argument that Ms. Burnett can show that Sheriff Gee violated a right guaranteed by the Fourth or Fourteenth Amendments, she still cannot show that a reasonable person in [Sheriff Gee's] position would have known that he had violated a clearly established right. The "facts and circumstances" of this

case, *see Gaddis ex rel. Gaddis*, ___ F.3d ___, 2004 WL 588529 at *6, are such that an officer in Sheriff Gee's position, facing an armed, mentally unstable person, could have acted in a similar manner, not realizing that he violated Mr. Wilson's Fourth or Fourteenth Amendment rights.

4. Is Sheriff Gee in his official capacity or Monroe County liable to Ms. Burnett under the Fourth or Fourteenth Amendments?

Ms. Burnett argues that Monroe County can be held liable even if Sheriff Gee, in his individual capacity, cannot for adopting an unconstitutional policy for the use of deadly force. This is true, if the complaint against the official in his individual capacity is dismissed on the basis of qualified immunity. *Doe v. Sullivan Cty, Tennessee*, 956 F.2d 545, 554 (6th Cir. 1992). Because this Court has found that there was no Fourth Amendment violation it concludes that no liability against the county was possible. *See id.* at 553-54. Nevertheless, out of an abundance of caution, this Court will address the claims against Monroe County as if its decision rests solely on the basis of qualified immunity.

The claims against Monroe County lack merit. First, as Ms. Burnett acknowledges, she cannot recover based on *respondeat superior*. *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978). Second, Ms. Burnett concedes that Monroe County had a policy, albeit an unwritten one, that "requires use of deadly force as a last resort when the life of his officers or members of the general public are in 'immediate danger' [and] leaves the officer with complete discretion in determining the circumstances when the use of deadly force would be appropriate."

(Dkt #15 at 27.) This policy, at worst, conforms with the specific commands of *Tennessee v. Garner*, 471 U.S. 1 (1985) and the general dictates that determinations about the force used encompass the "totality of the circumstances." *See Darrah*, 255 F.3d at 307.[4] A policy that complies with decisions framing the proper use of deadly force is constitutional.

5) Is Sheriff Gee liable under state law?

In addition to the federal claims discussed above, Ms. Burnett asserts state claims under KRS 503.090 and common law negligence. Summary judgment on these claims is also appropriate.[5] Kentucky law privileges force when used in response to the threat of deadly force against self. *See* KRS 503.100. Also, Ms. Burnett may not claim negligence against Sheriff Gee unless she shows he acted in bad faith; as both parties note, *Yanero v. Davis* controls.

> The "good faith" qualification to official immunity for discretionary acts was recognized by

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[4] As Sheriff Gee rightly observes, any attempt to require a policy to lay out all, or even most, of the situations where deadly force is "constitutionally approved" would require the policymakers, here Monroe County and Sheriff Gee, to engage in preemptive second guessing. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 999 (6th Cir. 1994) ("With the infallible perception of 20/20 hindsight, we can now see that there was a probability that [the plaintiff] might have remained inactive and hidden indefinitely. But this was not the perception from which we must assess the objective reasonableness of [the officers' actions.]").

[5] This Court may retain supplemental jurisdiction over Ms. Burnett's state law claims under 28 U.S.C. § 1367, and chooses to do so in this case in the interest of judicial economy and in light that the claims do not present "novel or complex issues of [Kentucky] law." § 1367(c)(1).

> our Court of Appeals in both *Thompson v. Huecker* and *Ashby v. City of Louisville*. In *Harlow v. Fitzgerald*, the United States Supreme Court defined the "good faith" component of qualified official immunity as having both an objective and subjective aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." The subjective component refers to "permissible intentions." Characteristically, the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ."

Yanero v. Davis, 65 S.W.3d 510, 523 (Ky. 2001) (citations omitted). Here, as noted earlier, Ms. Burnett can present no evidence that Sheriff Gee acted in bad faith, with malicious intention, or in reckless disregard for Mr. Wilson's constitutional rights.

CONCLUSION

For the reasons given above, this Court finds that Sheriff Gee did not violate the Fourth or Fourteenth Amendments when he shot and killed Mr. Wilson. Alternatively, if Sheriff Gee did violate those amendments, he is entitled to qualified immunity and, as a result, summary judgment on both Ms. Burnett's federal and state law

claims. So, too, is Monroe County and its officers, in light of the constitutionality of its policy.

Finally, this Court notes that nothing in this opinion is meant to trivialize or diminish the tragedy that occurred on April 2, 2002, or to excuse Sheriff Gee's conduct on that day. It may be that in retrospect his actions were rash, foolish, or unwise. Such actions, however, do not give rise to claims under the law this Court is obligated to follow. Therefore, Sheriff Gee's motion for summary judgment will be granted.

An appropriate order shall follow.

This is the 14 day of April, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CASE NO. 1:03CV-70-R

ONEITA J. BURNETT, Co-Administrator
of the Estate of Don Mark Wilson, ET AL.,

PLAINTIFFS

v.

JERRY "SLICK" GEE, et al.

DEFENDANTS

ORDER

For the reasons given in the accompanying Memorandum Opinion, the Defendants' motion for summary judgment (Dkt #10) is **GRANTED**. This case is **DISMISSED WITH PREJUDICE**.

This is a final and appealable order. There is no just cause for delay.

This is the 14 day of April, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel
faxed & mailed